Supreme Court, U.S.
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No. 88-1180

IN THE

e Court of the United States

OCTOBER TERM, 1988

ITY WORKERS UNION OF AMERICA,
IO, LOCAL NO. 246, and ALAN ROOK,
Petitioners,

v.

ERN CALIFORNIA EDISON COMPANY,
Respondent.

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etition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TIONERS' REPLY MEMORANDUM

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RINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE

Cases

Ackerman v. West
1514 (9th Cir. 1
Allis-Chalmers Co
(1985) .....
Caterpillar Inc. v.
S. Ct. 2425 (198
Electrical Workers
S. Ct. 2161 (198
Kirby v. Allegheny
(4th Cir. 1987)...
Laws v. CALMA
1988) .....
Lingle v. Norge Di
U.S. ——, 108 S
Machinists v. Wi
Comm'n, 427 U.
Miller v. AT & T
(9th Cir. 1988) .
San Diego Building
U.S. 236, 79 S.
Smolarek v. Chry
Cir. 1988).....
Strachan v. Union
1985) .....

State Constitution

Constitution of C

Statutes

Labor Managemen
§ 185(a).....
National Labor R
et seq. .....

ORITIES

Page

Co., Inc., 860 F.2d 7

k, 471 U.S. 202 ..... 4, 5, 7

482 U.S. 386, 107 ..... *passim*

481 U.S. ——, 107 ..... 4, 5

orp., 811 F.2d 253 8

d 430 (9th Cir. 7

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loyment Relations Ct. 2548 (1976) 5

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58 F.2d 1165 (6th 2, 7

F.2d 703 (5th Cir. 8

..... 1, 3

Act § 301, 29 U.S.C. 2, 4, 5, 7

, 29 U.S.C. §§ 151, ... 5

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Supreme Court of t

OCTOBER TE

No. 88-1

UTILITY WORKERS U
AFL-CIO, LOCAL NO. 2

v.

SOUTHERN CALIFORNIA

On Petition for a Writ
United States Co
for the Ninth

PETITIONERS' REPL

By rewriting both the Ninth Court's decisions, respondent Company ("SCE") seeks to the Ninth Circuit's decision i trary to this Court's decisions *liams*, 482 U.S. 386, 107 S. C *v. Norge Division of Magic* 108 S. Ct. 1877 (1988).[1] S

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[1] SCE also rewrites the petitione defense thereto. The petitioners di rely on the Collective Bargaining A [their] . . . complaint." Brief in Op *discrete* claims under the Californi

n States

ERICA,
N ROOK,
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MPANY,
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ANDUM

pinion and this
lifornia Edison
conclusion that
is squarely con-
lar Inc. v. Wil-
87), and *Lingle*
486 U.S. ——,
our contention

claims and its own
asserts, "choose to
n [they] fashioned
ather, we fashioned
alleging violation

collective bargaining agreement were intend
SCE from compliance with the privacy prov
California Constitution.

Concomitantly, the Ninth Circuit did n
suggests, consider the parameters of the
tection as a matter of state law and concl
state law cause of action turns on the prov
collective bargaining agreement.[3] To the
Ninth Circuit did not consider *at all* the n
state cause of action, or distinguish a s
cause of action from any other state cau
Instead, the Ninth Circuit held, *broadly*
ally, that where the employer simply *asse*
union "has *bargained away* its members'
stitutional rights" (Pet. for *Cert.*, App. A
phasis supplied), that assertion alone is
divest the court of the authority to consid
claimed state right. *See also id.* ("no co
that the right to be free from drug testin
cannot be negotiated away . . . .").

Implicitly recognizing this flaw in the N
holding, SCE also attempts to recast the N
characterization of its own defense. SCE n
an essential element of the petitioners'
existence of a reasonable expectation of
that a determination as to the reasonabl
such expectation necessarily entails exami
terms of the collective bargaining agreem
Opp. at 7-8. But, despite SCE's protest
contrary, the Ninth Circuit viewed the
as one of waiver, characterizing the iss
whether the petitioner union "has bargai
members' claimed constitutional rights." T
cuit made no inquiry at all into the natur

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[3] We note that while the state privacy protect
solute," no state court has suggested that the natur
tion turns in any way upon the terms of a colle
agreement, nor has the union in this case so conced

ment if and when that agreement becomes relevant as a *defense* to petitioners' state cause of action, but that by simply raising that defense, the employer can preclude the plaintiffs from litigating their state cause of action before any forum, state or federal. In other words, SCE argues that petitioners' cause of action is *completely* preempted, under the principles announced in *Allis-Chalmers* and *Hechler* and further explicated in *Caterpillar*. As to that argument, *Caterpillar* is in fact controlling.

In addition to LMRA § 301 complete preemption, the employer asserted, and the Court in *Caterpillar* addressed, two forms of NLRA preemption: (1) preemption of state law that "upsets the balance of power between labor and management expressed in our national labor policy[,]" *citing Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 146, 96 S. Ct. 2548, 2556 (1976); and (2) preemption of state law that infringes upon the NLRB's primary jurisdiction over unfair labor practice charges, *citing San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773 (1959). *Caterpillar*, 107 S. Ct. at 2432. As to these NLRA preemption issues, not the LMRA § 301 preemption question involved here, the Court held that "[t]he fact that a defendant might ultimately prove that a plaintiff's claims are preempted under the NLRA does not establish that they are removable to federal court." 107 S. Ct. at 2432. The Court also noted that the merits of *those* preemption questions should be "addressed in the first instance by the state courts in which [the plaintiffs] filed their claims. 107 S. Ct. at 2433 n.13.

The employer in *Caterpillar* also argued, as a *defense* to the state cause of action asserted, that the collective bargaining agreement waived any state law rights the employees may have had. That waiver argument has a precise parallel in this case, despite SCE's protestations to the contrary. *See* pp. 3-4, *supra*. But the Court held that while such a waiver defense may indeed raise a

eck, and since the waiver defense is the only basis Ninth Circuit asserted for finding preemption, this of action is as non-preempted as the one in *Lingle*.

As to the existence of a conflict between the Sixth Ninth Circuits, SCE apparently argues that the ce of a conflict depends solely upon whether the n line result reached by the Circuits is the *same* in *cal* cases, rather than whether the Circuits have ed inconsistent rationale that will lead inevitably *posite* results in *similar* cases. It is true that both xth and Ninth Circuits have reached the same bot- ine result regarding preemption of state anti-dis- nation claims. *Compare Smolarek v. Chrysler Corp.*, .2d 1165 (6th Cir. 1988) *with Miller v. AT & T rk Systems*, 850 F.2d 543 (9th Cir. 1988) *and man v. Western Electric Co., Inc.*, 860 F.2d 1514 Cir. 1988). But the Ninth Circuit's *rationale* here odds with the Sixth Circuit's *rationale* in *Smolarek*. Sixth Circuit plaintiff employees will be permitted gate their state law claims even where the employer s a defense of right under the collective bargaining ment. 858 F.2d at 1170. But in the Ninth Circuit, correction from this Court, where the employer ds by invoking the terms of the collective bargain- greement, plaintiff employees will be permitted to e only those state law claims that are already "well- ished" and "recognized" through "published opin- of the state's courts. Pet. for *Cert.*, App. D at 5.[5]

eed, this requirement of documented judicial lineage crux of the Ninth Circuit's holding here. Rather

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s holding is taken from footnote 5 of the Ninth Circuit's in *Laws v. CALMAT*, 852 F.2d 430 (9th Cir. 1988). Foot- of *Laws* was incorporated by reference into the Ninth Cir- pinion below as the circuit court's sole reference to and treat- f the Court's recent opinion in *Lingle*. Pet. for *Cert.*, App. 1a.

than apply this Court's rationale in *Lingle* respecting the right of states to provide substantive protections to workers which do not depend for their existence upon the interpretation of a collective bargaining agreement, 108 S. Ct. at 1884-85, the Ninth Circuit engaged in sophistry by distinguishing *Lingle* on the basis of the non-dispositive historical fact that there the plaintiff's substantive state law claim was neither novel nor untested.[6] Is it the policy of the federal courts exercising pendent jurisdiction to so stifle the development of state substantive law protecting employees? The answer currently depends upon the circuit in question.

Finally, SCE criticizes the petitioners for failing to advise the Court as to two circuit court opinions "in total *harmony*" with the Ninth Circuit's opinion here. Brief in Opp. at 9. Again, SCE's view of "harmony" relates only to the bottom line result. In *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985), and *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987), the circuit courts held that certain state law privacy claims were preempted. However, both *Strachan* and *Kirby* pre-date this Court's decisions in *Lingle* and *Caterpillar*; contain rationale inconsistent with the rationale of *Lingle* and *Caterpillar*; and are, therefore, wrongly decided under the Court's current analysis. Thus, to the extent that they misapply the law to reach an erroneous result, *Strachan* and *Kirby* are "in total *har-*

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[6] The Court's discussion of Illinois precedent respecting the tort of retaliatory discharge for filing a worker's compensation claim served two useful purposes: (1) it demonstrated the irrelevance of the collective bargaining agreement to the *elements* of the claim, and (2) it filled a statutory void in that the Illinois cause of action is not based upon any specific statutory provision. *Lingle*, 108 S.Ct. at 1882-82. The discussion did not, however, have as its purpose the imposition of a requirement that any such state law claim must be "well-established" or suffer extinction in the face of a collective bargaining agreement.

mony" with the Ninth Circuit's opinion here. But as regards *Lingle* and *Caterpillar*, they offer only dissonance.

Respectfully submitted,

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